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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 757

STATE OF NORTH CAROLINA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered February 11, 1955, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The order

increased certain intrastate rail rates on freight moving in North Carolina.

Following a nation-wide increase in interstate freight rates ordered by the Commission, rail carriers operating in North Carolina requested the North Carolina Utilities Commission to grant comparable increases in intrastate freight rates. The state commission refused to do so,[1] and the carriers then petitioned the Interstate Commerce Commission to increase the intrastate rates to the level of the interstate rates. After full administrative proceedings, the Commission granted the requested increases with certain minor exceptions. *North Carolina Intrastate Freight Rates and Charges,* 293 I.C.C. 541.

On review, a three-judge district court unanimously sustained the order. The court (*per* Circuit Judge Parker) held that the Commission's findings are adequate to support the order, and that the findings in turn are "unquestionably supported by the evidence."

ARGUMENT

Section 13 (4) of the Interstate Commerce Act authorizes the Commission to prescribe new intrastate rates if it finds that existing intrastate rates cause (1) unjust discrimination against interstate commerce, or (2) undue preference or prejudice against persons or localities in interstate commerce. In *King* v. *United States,* 344 U.S. 254, this Court

[1] The state commission initially had granted certain of the increases for a limited time, but it refused to extend them after its first order had been set aside by a state court.

held (pp. 270-271) that a Commission order designed to remove unjust discrimination against interstate commerce, which increased Florida intrastate rates to the interstate rate level, was supported by findings (1) that the intrastate rates were abnormally low and were not contributing their fair share to the carriers' revenues; (2) that the transportation conditions incident to the intrastate movement were not more favorable than those incident to the interstate movement; (3) that the increased intrastate rates would not exceed a just and reasonable level; and (4) that such increased rates would substantially increase the carriers' revenues therefrom, and would constitute not more than a fair proportion of their total income. As the court below correctly held, the Commission's findings in the instant case were "in essence" the same as those in *King* and they fully support the order. [2]

The lower court also correctly held that the Commission's findings were adequate to support the conclusion that the intrastate rates caused undue preference and prejudice between persons or localities. In addition to the findings previously

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[2] In the instant case, the Commission found (293 I.C.C. at 559-560), *inter alia*, that the intrastate rates were abnormally low and not producing their fair share of the carriers' necessary earnings (Fdg. 3), that the conditions incident to North Carolina intrastate transportation are not more favorable than those incident to the interstate transportation (Fdg. 1), and that the increased intrastate rates will not be unreasonably high and will increase the carriers' annual revenues by at least $1,300,000 (Fdg. 6).

noted (see *supra,* note 2), the Commission found that, with certain exceptions, there is active competition between persons and localities engaged in intrastate commerce and those in interstate commerce, and that the competition extends throughout the state and to freight traffic generally (Fdg. 4, 293 I.C.C. at 560). These findings are adequate to sustain a statewide order for the removal of the preference and prejudice. *Georgia Public Service Commission* v. *United States,* 283 U.S. 765; *Louisiana Public Service Commission* v. *Texas and N. O. R. Co.,* 284 U.S. 125.

Appellants do not challenge the sufficiency of the findings to sustain the order. Their principal contention (Jurisdictional Statement 7-14) is that the findings lack adequate evidentiary support. This issue was fully briefed and argued before the lower court which, after careful consideration, concluded that the findings were "unquestionably supported by the evidence." We submit that the correctness of this conclusion presents no question of general importance justifying further review by this Court.

The underlying evidence is summarized in the Commission's report, and we shall not repeat it here. We invite attention, however, to the fact that the lengthy record before the Commission contained extensive data on such matters as economic conditions in the state (293 I.C.C. at 545-548); intrastate operating conditions (p. 548); the relationship between the interstate and intrastate rates (pp. 549-550); movements of the principal

commodities handled by railroads in North Carolina, and transportation factors affecting such movements (pp. 550-557).[3]

This Court has indicated that the initial reviewing court has "primary responsibility"[4] for determining "[w]hether on the record as a whole there is substantial evidence to support agency findings," and that it will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. There is no claim here that the lower court mis-

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[3] Although appellants complain (Jurisdictional Statement 7-9) that there is no evidence as to segregated interstate and intrastate operating expenses, revenues and property, it is settled that "[w]here the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no reason to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues." *Illinois Commerce Commission* v. *United States,* 292 U.S. 474, 483-484, and cases there cited; *King* v. *United States,* 344 U.S. at 273. Since the Commission found (293 I.C.C. at 548) that the interstate and intrastate traffic were handled under similar conditions, segregated figures were not required.

Appellants' contention (Jurisdictional Statement 11-13) that there is no evidence that the higher interstate rates prevented out-of-state shippers from selling in the North Carolina market similarly is beside the point. The Commission can raise intrastate rates which cause undue preference and prejudice to persons or localities in interstate commerce and there may be such preference or prejudice even though it does not actually exclude interstate shippers from the intrastate market.

[4] *National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U.S. 498, 502.

conceived its reviewing function and there appear to be no special circumstances which would warrant a second recanvassing of the record. See *New England Divisions Case,* 261 U.S. 184, 203-204; *Radio Corp.* v. *United States,* 341 U.S. 412, 415; cf. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342. The fact that there may be evidence in the record from which another trier of the facts might have reached a conclusion contrary to that of the Commission affords no basis for overturning the Commission's order. See *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 536.[5]

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[5] Appellants also contend (Jurisdictional Statement 14-15) that the Commission cannot grant increases which the carriers had not previously sought from the state commission. But Section 13 (4) of the Act gives the Commission plenary power to raise intrastate rates "whenever" it finds that such rates discriminate or cause preference and prejudice against interstate commerce, and once it makes that finding it can grant the increase without regard to whether a comparable increase had been sought from the state commission. Cf. *Florida* v. *United States,* 282 U.S. 194, 210.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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MAY, 1955

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 344014 1453